**UNITED STATES OF AMERICA**
**NATIONAL LABOR RELATIONS BOARD**
**REGION 8**

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| **SOUTH EUCLID ASPHALT & CEMENT, INC.**<br>**Employer**<br><br>**and**<br><br>**OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 404**<br>**Petitioner** | **Case No. 8-RC-16334** |
| **and**<br><br>**BRICKLAYERS AND ALLIED CRAFTSWORKERS LOCAL UNION NO. 16**<br>**Intervenor** | |

## DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.[1]

The following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> *All full-time and regular part-time employees of the Employer engaged in cement mason work including journeymen and apprentices; excluding all office clerical employees, professional employees, guards*

[1] The Petitioner and Intervenor filed post-hearing briefs that were duly considered. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. The labor organizations involved claim to represent certain employees of the Employers. A question affecting commerce exists concerning the representation of certain employees of the Employers within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

*and supervisors as defined in the Act, and all other employees.*

**Issues**

There are two primary issues to be determined in this representation proceeding. First, is the Employer party to any Section 9(a) contracts that present a bar to the instant proceeding. Second, must the unit be limited geographically in order to be deemed appropriate. In addition, the Intervenor's raises in its brief eligibility issues of two employees of the Employer. It asserts that Jeffrey Marszal is a statutory supervisor, and that Anthony Rendina, is the Employer owner's son. Thus, it asserts that both are not eligible to vote in any directed election.

**Decision Summary**

The Petitioner seeks a unit of cement mason journeymen and apprentices employed by the Employer. The Intervenor asserts that the Petition is barred by a Section 9(a) contract applicable to a substantial number of unit employees. In the alternative, the Intervenor argues that the unit should be restricted to Cuyahoga County only or be restricted to the four counties in which the Employer performed work in the preceding two years, i.e., Cuyahoga, Lake, Lorain, and Summit Counties, Ohio. The Employer takes no position on the contract bar issue or on the composition of the unit.

Finding no contract bar to the instant representation proceeding, I find the petitioned for unit appropriate and hereby direct an election therein. Employee, Jeffrey Marszal, may vote under challenge, while Anthony Rendina is ineligible to vote as a non-employee under Section 2(3) of the Act.

**Facts**

The Employer is an Ohio corporation engaged in concrete construction work. Its principal office and place of business is located in South Euclid, Ohio. The Employer has a core group of three employees who work for the company performing cement mason work. The majority of the jobs obtained by the company are within Cuyahoga County, Ohio, but the Employer bids on and accepts work in surrounding counties. In the last two years, the Employer has worked on projects in Lorain, Lake, and Summit Counties. During an undisclosed period in the past, the Employer also has performed work in Medina and Portage Counties.

The Employer has used the same core group of employees to work on the cement mason jobs regardless of the county in which the job is located. The employees in the core group, however, are all members of Petitioner union. When the Employer needs workers in addition to its core group, it obtains any additional workers from the Petitioner.

Due to performing work in at least four different counties, the Employer is party to agreements with four different locals of cement mason unions.[2] The Petitioner has an 8(f) agreement with three Ohio area employer associations effective from May 1, 1997 to April 30, 2001 and on a yearly basis thereafter. The Employer agreed to be bound by the Association agreement by signing an Acceptance of Agreement form. The Petitioner's Association agreement with the Employer is limited to the county of Cuyahoga, while the Petitioner and Employer's Acceptance of Agreement form specifically excludes Ashtabula, Geauga, Lake, and Lorain Counties.

[2] The fourth local union with whom the Employer signed an agreement is not specifically identified in the record, nor is a fourth agreement in evidence.

The Employer has also signed an Assent of Participation document thereby agreeing to abide by the Intervenor's collective bargaining agreement with the Northeast Ohio Contractors Association, effective from May 1, 1999 to April 30, 2002. The Employer has executed an Agreement for Voluntary Recognition with the Intervening union as well.[3] The Intervenor's agreement sets forth the Intervenor's geographical jurisdiction as including Ashtabula, Lake and Geauga Counties of Ohio.

In addition, the Employer has an agreement with Operative Plasterers' and Cement Masons' International Association Local Union No. 109, effective from June 1, 2001 to June 1, 2006. This agreement covers Carroll, Homes, Medina, Portage, Stark, Summit, Tuscarawas, and Wayne Counties of Ohio.[4] The recognition clause of the contract provides, in part, that "The Employer further acknowledges that the Union has established to the satisfaction of the Employer that the Union represents a clear majority of the Employer's employees who perform work covered by this agreement."

The Petitioner seeks a unit that includes all of the Employer's journeymen and apprentice cement masons. The Employer does not dispute the propriety of the petitioned for unit. The Intervenor first alleges that the Petition is barred by the Employer's contract with Local 109. If the Petition is not barred, the Intervenor objects to the unlimited geographic scope of the unit based upon either the geographic limitations set forth in the Petitioner's collective bargaining agreement with the Employer or the Employer's work history.

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[3] In my decision in **Gash Concrete Construction Co., 8-RC-16332**, I found this same contract to be a Section 9(a) contract, and I am satisfied that this Employer and the Intervenor's contracts meet the criteria for Section 9(a) agreements as set forth in **Staughton Fuel & Material, Inc., 335 NLRB No. 59 (2001).**

[4] Local 109 did not appear at the hearing. On March 26, 2002, I sent a letter by facsimile to Local 109 advising it that if it wished to intervene in this proceeding it should so indicate by the close of business on Monday, April 1, 2002. No response was received from Local 109.

**Contract Bar**

The Board recently refined the circumstances under which a recognition agreement or contract provision will establish a union's Section 9(a) status. According to the Board's decision in **Staughton Fuel & Material, Inc., 335 NLRB No. 59 (2001)**, a recognition agreement or contract provision will be independently sufficient to establish a Union's 9(a) status where the language unequivocally indicates that (1) the Union requested recognition as the majority or Section 9(a) representative of the unit employees; (2) the employer recognized the union as the majority or Section 9(a) bargaining representative; and (3) the employer's recognition was based on the union's having shown, or having offered to show, evidence of its majority support.

In the instant case, the Acceptance of Agreement signed by the Employer with the Petitioner only binds it to adhere to the terms and conditions of Petitioner's area Cement Mason's Agreement. Clearly, the relationship between the Employer and Petition is an 8(f) relationship.[5] The Employer's relationship with the Intervenor, however, is a Section 9(a) relationship based upon the language of its voluntary recognition agreement. That agreement does not block the processing of the Petition since the expiration date of the Intervenor's contract with the Employer is April 30, 2002. The Petition was filed on February 14, 2002, well within the 60 to 90 day window period permitting such filings. **Leonard Wholesale Meats, 136 NLRB 1000 (1962)**.

As for the Employer's collective bargaining agreement with Local 109, I find that the recognition language is insufficient to establish Section 9(a) status under **Staughton Fuel** because it does not unequivocally state that the employer's recognition was based

on the union showing, or having offered to show, evidence of majority support. Accordingly, I find that Local 109's contract is an 8(f) contract and consequently is not a bar to the instant petition. **John Deklewa & Sons, 282 NLRB 1375, 1387 (1987); Staughton Fuel.** Thus, I find there is no contract bar to this representation proceeding.

**Unit Scope**

In this case the Petitioner seeks a unit with no geographic limitation and the Employer does not dispute the propriety of such a unit. The Intervenor alone sought a unclear geographic limitation at the hearing, which it refined in its post-hearing brief and which would include either Cuyahoga County or the four counties in which the Employer performed work in the last two years. I find the petitioned for unit appropriate for several reasons. First, the Petitioner need only seek an appropriate unit, not the most appropriate unit**. Overnite Transportation Co., 322 NLRB 723 (1996).** The evidence clearly establishes that the Employer has utilized the core group of cement masons at all of its jobs within a four county radius in the past 24 months. Even though the Employer does not routinely perform work in all the counties, the record indicates that these same employees will be used if such work arises in the future. In fact, the Employer does not limit its bids for work to any particular area and will continue to bid on retail chain work that may occur in a variety of counties.

When the Board has addressed the appropriate geographic scope of construction bargaining units, it has examined (1) whether there is a core group of employees who travel from place to place, and (2) the history of where the core group has worked or

[5] Even if there was a 9(a) relationship between the Employer and Petitioner, a petition involving a recognized bargaining representative seeking certification during the term of its Section 9(a) agreement

reasonably foresees working in the future. **Alley Drywall, Inc., 333 NLRB No. 132 (2001)**; **Oklahoma Installation Co., 305 NLRB 812 (1991)**(geographic scope limited to places where employer has actually conducted business or there is some "likelihood" that it will in the future; areas excluded where employer said it has no intention to bid in the future). The Board has been amenable to limiting units on a geographic basis when the petitioner requests it. **Dezcon, Inc., 295 NLRB 109 (1989)**. Where another party seeks to exclude a county or other geographic area sought by a petitioner, it must show that the employer involved has never done business in that area and there is no basis for concluding that it will do business there in the future. **Oklahoma Installation Co., 305 NLRB 812 (1991)**. In this case it is clear that the Employer has performed work in at least four counties in the past 24 months, in addition to performing work in Medina and Portage Counties on other occasions. Additionally, the Employer has expressed the intention of bidding for work wherever it has a likelihood of obtaining work, including the varied locations of work for large retail chains like Walgreen's and Home Depot.

The Intervenor argues for either a geographic limitation to Cuyahoga County or the four counties in which the Employer performed work in the last 24 months. Any geographic limitation, however, would bear no relationship to the manner in which the Employer conducts its business; i.e., using the same core group of employees on most, if not all, of its jobs regardless of the location. The Board noted recently that geographic limitations in Section 8(f) agreements, which bear no relationship to the manner in which the employer actually conducts its business, should not be given controlling weight in making unit determinations**.** **Alley Drywall, Inc., 333 NLRB No. 132 (2001)**. Therefore, the Intervenor's position that the unit be limited to Cuyahoga County only

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presents a long recognized exception to contract bar rules. **General Box Co., 82 NLRB 678 (1948).**

cannot stand given the Employer's practice of using its core group on jobs outside Cuyahoga County. As for its position that the unit be limited to a four county area, the Intervenor has failed to show that the Employer has never conducted business outside the four county area or that it will not do so in the future. In light of the record evidence that the Employer moves the same core group of cement masons from job site to job site, and has no intention of geographically restricting its bids for future work, I deem it appropriate to direct an election in a unit without geographic restrictions.

**Individual Exclusion Issues**

In its brief, the Intervenor identified two individuals to be excluded from the unit. The first person is Jeffrey Marszal, a working foreman. The second is Anthony Rendina, also a working foreman and the son of the Employer's owner. The Intervenor asserts that Marszal is a Section 2(11) supervisor and that Rendina is excluded as the owner's son under Section 2(3) of the Act. I find that Marszal may vote under challenge and that Rendina is not eligible to vote in the election directed herein.

Section 2(11) of the Act defines the term "supervisor" as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of merely routine or clerical nature, but requires the use of independent judgment." The burden of proving supervisory status is on the party who alleges that it exists**. California Beverage Co., 283 NLRB 328 (1987)**. The exercise of some supervisory authority in merely routine, clerical, perfunctory or sporadic manner does not confer supervisory status. **Chicago**

**Metallic Corp., 273 NLRB 1677, 1689 (1985), aff'd. in relevant part 794 f.2d 527 (9th Cir. 1986).** The question is not whether the alleged supervisor uses independent judgment in solving problems, but whether he uses independent judgment with respect to the exercise of one or more of the specific authorities listed in Section 2(11). **Alois Box Co., 326 NLRB 1177 (1998).** There is no record evidence showing that the cement mason foreman is actually a supervisor under Section 2(11) of the Act. Thus, Foreman Jeffrey Marszal, may vote under challenge in the election directed herein.

Anthony Rendina, another foreman, is the son of the Employer owner. This relationship is clear from the record, therefore, Anthony Rendina is excluded from the unit under Section 2(3) of the Act. That section exempts from the definition of employee any individual employed by his parent or spouse. See **Kirkpatrick Electric Co., 314 NLRB 1047, n2, 1053 (1994)**(son of majority stockholder excluded from bargaining unit).

Since the Employer is engaged in the construction industry and the record reflects that the number of unit employees varies from time to time, the eligibility of voters will be determined by the formula in **Daniel Construction Co., 133 NLRB 264 (1961)** and **Steiny & Co., 308 NLRB 1323 (1992).**

## DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work

during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

Also eligible to vote are those employees who have been employed for a total of 30 working days or more within the period of 12 months immediately preceding the eligibility date for the election, or who have some employment in that period and have been employed 45 working days or more within the 24 months immediately preceding the eligibility date for the election, and who have note been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed.

Those eligible shall vote whether or not they desire to be represented by: (1) Bricklayers and Allied Craftsworkers Local Union No. 16; or (2) Operative Plasterers and Cement Masons International Association Local Union No. 404; or (3) Neither.

## LIST OF VOTERS

In order to ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with

them. **Excelsior Underwear Inc., 156 NLRB 1236 (1966)**; **N.L.R.B. v. Wyman-Gordon Co., 394 U.S. 759 (1969)**. Accordingly, it is directed that an eligibility list containing the ***full*** names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of this decision. **North Macon Health Care Facility, 315 NLRB 359 (1994)**. The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

## RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by April 24, 2002.

Dated at Cleveland, Ohio this 10th day of April 2002.

/s/ Frederick J. Calatrello

Frederick J. Calatrello
Regional Director
National Labor Relations Board
Region 8

440-1700